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July 14, 2006

**VIA EMAIL AND
CERTIFIED MAIL RETURN RECEIPT REQUESTED**

Ms. Melissa Taylor, Remedial Project Manager
United States Environmental Protection Agency
Office of Site Remediation and Restoration
1 Congress Street, Suite 1100 (HBO)
Boston, MA 02114-2023

Re: Notice of Potential Liability Shpack Landfill Superfund Site, Attleboro and
Norton, Massachusetts (the "Site")

Dear Ms. Taylor:

This letter is in response to EPA's letter dated May 3, 2006, with attachments (the "Notice Letter") to Mr. David J. Brask as notification of potential liability for contamination located at the above referenced location and pursuant to the Environmental Protection Agency's (the "EPA") purported authority under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§9601 et seq. ("CERCLA"). Without admitting the sufficiency of your letter under CERCLA, Mr. Brask denies any liability for response costs and damages relating to contamination at or from the Shpack Landfill Superfund Site. This letter should be construed as a timely response (in accordance with our agreement for extension through July 15, 2006).

The basis for your claim against Mr. Brask fails based upon the evidence we received thus far which includes: the Notice Letter; February 15, 2006 letter from Robert Cianciarulo, Chief MA Superfund, Office of Site Remediation & Restoration and March 20, 2006 response to same from Mr. Brask ("Response Letter"); May 19, 2004 Deposition of Albert Dumont ("2004 Dumont"); January 31, 2006 Deposition of Albert Dumont ("Dumont Vol. I"); continued on February 1, 2006 ("Dumont Vol II") and continued on February 10, 2006 ("Dumont Vol III"); and, EPA Witness Summaries as provided by Michael P. Last, Esq. (referred to by each Witness identification). In reviewing these materials, we find no substantial evidence that Mr. Brask, doing business as Goditt & Boyer ("G&B") during the relevant time frame, either accepted hazardous substances for transport to the Site or was a former operator of the Site when hazardous substances were being disposed (and substantial availability of CERCLA defenses and exemptions/exceptions as noted below), as alleged by EPA in the Notice Letter.

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History of the Site and G&B

The EPA defines the Site as two parcels. The first parcel, referred to as the Dumont Parcel, is a 3.4 acre area in Attleboro formerly owned by Albert Dumont and currently owned by Attleboro Landfill, Inc. This triangular portion of the Site was used as a burning dump from 1946 through 1965. The second parcel, referred to as the Shpack Parcel, is approximately 6.0 acres located in Norton which was formerly owned by Lea and Isadore Shpack and currently owned by the Town of Norton. Our understanding from your materials is that the EPA is investigating the Dumont Parcel for the years 1946 through 1965 and the Shpack Parcel from 1946 through 1975, and our review of the materials has focused on this timeline.

In 1958 G&B was taken over by Mary Brask, Mr. Brask's mother. At that time, G&B was in the business of buying and selling iron, metal and paper. Mary Brask operated G&B as a sole proprietorship. After his mother's passing in 1963, Mr. Brask operated G&B again as a sole proprietorship and, later, G&B was incorporated in 1965. Response Letter. There is no evidence that Mr. Brask assumed his mother's obligations.¹

There is affirmative evidence that during the years from 1946 through 1975, G&B and Mr. Brask did not haul or deliver any materials to the Shpack Parcel. Mr. Dumont testified that he never saw Mr. Brask or any G&B trucks in the Shpack parcel and that Mr. Brask never operated the Shpack parcel. Dumont Vol. II at 216-17. Mr. Dumont also stated Mr. Brask never performed any bulldozer work on the Shpack parcel. Dumont Vol III at 68-70. EPA Witness T, a former employee of G&B from 1964 until 1978, states he never dumped at the Shpack Landfill, Inc. but dumped at the Attleboro landfill [Dumont Parcel]. EPA Summary of Witness T. Based upon this testimony, Mr. Brask and G&B did not have any contact, business or haul any materials to the Shpack parcel. As the irrefuted testimony clearly indicates, Mr. Brask d/b/a G&B did not have any connection to or involvement with the Shpack parcel, the EPA has no basis for a claim against Mr. Brask as a potentially responsible party for costs and reimbursements related to the Shpack parcel. Therefore, the rest of this letter will discuss the testimony surrounding the activities occurring on the Dumont parcel, also known as the burning dump.

As the EPA's period of investigation on the Dumont Parcel ends in 1965 (the same year G&B was incorporated) and David Brask did not control G&B until 1963, the only precisely relevant time frame is 1963 to 1965. In the interest of completeness, evidence related to other

¹ Continuity of an enterprise does not exist when one sole proprietor succeeds another, even in the event of death, as there is not legal identity separate from the individual. Vernon v. Schuster, 179 Ill.2d 338 (Ill., Dec 18, 1997). CERCLA is silent on the issue of successor liability and therefore, traditional federal common law doctrines apply. New York v. National Services Industries, 352 F.3d 682 (2nd Cir. 2003).

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periods will be discussed herein, but with recognition that only the period from 1963 to 1965 (death of Mary Brask to incorporation or cessation of burning dump operations, whichever was earlier) is irrelevant.

G&B and the Dumont Parcel

The testimony and information provided by Mr. Brask and EPA shows Mr. Brask did business as G&B, a hauling business, from 1963 to 1965, which brought trash (paper and pallets) from area companies to the Dumont parcel, also described as the burning dump, unloaded the trash at the direction of others and was never an operator of the Site.

In 1946, Mr. Dumont's father was the owner of the Dumont parcel when he began accepting delivery of waste. Dumont Vol. I at 11-13. From 1954 through 1956, Mr. Dumont's aunt was running the dump until Mr. Dumont returned from "the service" and took over operations with his wife around October 1955. Dumont Vol. I at 16; Dumont Vol. II at 14. During the period from 1946 through 1965, Mr. Dumont states that every factory in Norton and Attleboro disposed of rubbish and chemicals at the Dumont Parcel. Dumont Vol. II at 16. As evidenced by four (4) days of testimony, Mr. Dumont was able to recall many details regarding the operations and history of the Dumont parcel, although many of these recollections are beyond the period of investigation ending in 1965.

G&B was a hauler to the Dumont Parcel. Mr. Dumont states he never saw hazardous waste substances in the trash delivered by G&B and, when pushed, said there may have been small quantities but he does not know for certain. Dumont Vol. II at 76-77, 82. The type of materials delivered by G&B were both general trash and industrial waste, and the G&B delivery schedule was frequent, possibly hourly (at unspecified years). Dumont Vol. II at 78-80. Specifically, Mr. Dumont states G&B did not bring paint or toner materials and oils or absorbents to the Dumont Parcel. Dumont Vol. II at 80. From 1958 through 1961, Mr. Dumont describes G&B's hauling operations to the Dumont Parcel as consisting of only an old pick up truck which had a capacity for only small loads. Dumont Vol. II at 81. Witness U, also a former employee of G&B during the 1960s, states he delivered waste to both the Dumont Parcel and the J. M. Mills Dump, but more regularly at the Dumont parcel because he was treated well by Mr. Dumont and Mr. Dumont would tell the drivers where to dump. EPA Witness U Summary.

Around 1959 or so, for an approximate period of three (3) years, Mr. Dumont recalls the Town of Seekonk using the burning dump for household trash which was delivered by G&B. Dumont Vol. III at 35-36. Witness L, who did not start his own hauling business until 1968, states "two guys" who later formed Goditt & Boyer used the Attleboro dump [Dumont Parcel] from 1955 forward. EPA Witness L Summary.

During Mr. Dumont's deposition, he recalls a company named Sisalkraft which disposed of waste at the Dumont parcel around 1960 through 1965. Dumont Vol. I at 61. The waste was hauled by G&B and consisted of paper materials and was brought as often as daily or every three

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(3) to four (4) days. Dumont Vol. I at 61-62. Mr. Dumont states this trash was not brought to the Schpack parcel. Dumont Vol. I at 61-62. Witnesses S and T also noted G&B's hauling activities for Sisalkraft. EPA Summaries of Witness S and T. Witness T, a former G&B employee, states the hauling began around 1964 from this location and describes the materials hauled from Sisalkraft as loads of paper consisting of different types of wrappings, insulations, tar paper, fiberglass reinforced wrappings and regular paper which smelled of isopropyl alcohol. EPA Witness T Summary. Witness GG, a former Sisalkraft employee from 1963 through 1979, recalls G&B hauling the company's trash to the Dumont Parcel. G&B would take the metal containers filled with paper waste to the Dumont burning dump. EPA Witness GG Summary. Witness GG describes the trash and paper as being tar paper, aluminum paper which contained some lead, oil proof paper with a resin adhesive, and a plastic coated paper, and employees threw rags with cleaning solvent in the trash bins picked up by G&B. EPA Witness GG Summary.

Mr. Dumont states he does not remember any aerosol cans being delivered from Puritan Aerosol, instead only pallets, and does not remember who hauled these materials but that it occurred around 1965. Dumont Vol. I at 59-60. Witness U stated that G&B did some hauling for Puritan Aerosol and recalls the waste was "90%" paper and from the office areas and aerosol cans around the "early 1960's." EPA Witness U Summary.

When questioned about an old newspaper article, Mr. Dumont states that hauling and dumping operations were performed by G&B and in the later unspecified years G&B had a packer truck which compacted the trash before delivering it to the Dumont parcel. Dumont Vol. I at 136; Dumont Vol. II at 35.

Witness T also describes picking up materials from Texas Instruments but does not specify a time frame or if this was performed while working for G&B or another trucking company. EPA Witness T Summary. Witness U recalls picking up trash at Thompson Chemical which was compressed inside containers at the time it was picked up, but noticed upon dumping the debris, it contained white powdery dust and consisted mostly of defective and used garden hoses and regular trash. EPA Witness U Summary. Witness U also recalls picking up trash from Teknor Apex in two six-yard containers on a daily basis which were covered with a black powdery dust and generally contained some pieces of rubber mixed with trash which he brought to either the J.M. Mills location or the Dumont Parcel. EPA Witness U Summary. Witness U also describes picking up materials consisting of broken bricks from construction and black powdery dust at Carol Cable Company. Witness U fails in any way to identify these activities as having occurred between 1963 and 1965.

Mr. Brask operated G&B as a d/b/a only from 1963 to 1965. For the time period 1963 to 1965, there is little or no direct evidence of G&B hauling materials to the Dumont Parcel. The only direct evidence concerns the testimony of witnesses T and GG and Mr. Dumont relating to loads of paper and pallets. There is no evidence that these loads included anything other than incidental hazardous substances. At most, the items deposited (or any incidental hazardous substances) could only incidentally and in an inconsequential way contribute to the

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contamination giving rise to the remedial approach adopted in the ROD. The contaminants referenced on Tables L-1, 2, 3 of the ROD Summary have no connection with these materials, with the possible incidental connection of past combustion of paper and pallets to create PAHs (but this impact is common to virtually any materials brought to the facility). The hazardous substances suggested or noted as possibly incidentally present are too vaguely described to meaningfully consider. It is exactly this sort of inequitable “seizure on a blemish as a fatal flaw” that the courts have sought to extinguish through the divisibility of harm analysis. See United States of America v. Hercules, Inc., 247 F.3d 706, 715-719 (2001) and in the First Circuit in Acushnet Company v. Coaters, 937 F. Supp. 988 (1997). Under Acushnet there must be a “causal connection” between the defendant’s waste and the government’s response costs. The vague notion that something was or could have been present which could have given rise to contamination is not sufficient to satisfy contemporary CERCLA practice.

There is no evidence that the materials described by the EPA Witnesses or Mr. Dumont as hauled by G&B between 1963 and 1965 were hazardous substances, or, more significantly, gave rise to the contamination to be addressed by the ROD. The hauling services to the Dumont Parcel in the area were not performed exclusively by G&B and G&B also used a second dump site, J.M. Mills. The Dumont Parcel was also open seven days a week for twenty four hours per day and anyone and everyone brought materials to the Site. It is uncontested that G&B never dumped materials on the Shpack Parcel. Due to the proximity of the boundary line of the Shpack Parcel and Dumont Parcel and the pushing of materials back and forth over the boundary, it is difficult, if not impossible, to determine which parcel is the source of contamination. These facts do not support the designation of Mr. Brask as a potentially responsible party.

Based upon the above descriptions of materials transported by G&B during the years of 1963-1965, there is no evidence that: the materials were or contained hazardous substances or that the contaminants found at the Site were found in materials transported by G&B between 1963 and 1965. The Record of Decision Summary dated September 2004 in this matter lists both in kind and volume a variety of contaminants well beyond the description of G&B’s activities between 1963 and 1965 herein. The EPA must show at a *prima facie* level that G&B arranged/transported hazardous substances between 1963 and 1965 from which the need for the ROD arose. The EPA has not done so based on the evidence provided herein.

G&B and City of Attleboro Contract

Mr. Dumont describes that the City of Attleboro in “around 1964,” as operator of the municipal refuse facility on Mr. Dumont’s land, contracted for a third party to provide equipment and labor to keep the Dumont parcel clear. Dumont Vol. I at 142. This work was contracted to G&B as evidenced by a contract between the City of Attleboro and David J. Brask dated September 5, 1963 (the “Contract”) and shown as Attachment E to Notice Letter. The contract specifies G&B is to “furnish equipment and labor to maintain dumping area at the City of Attleboro public refuse disposal site on Union Road” and “all operations to be directed by the site caretaker and final results shall meet the approval of the City of Attleboro Health

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Department Agent.” The contract covered a one year term. The time frame of this contract is consistent with Mr. Dumont’s deposition testimony.

Mr. Dumont explains that he was the bulldozer operator who performed the duties described in this Contract. Dumont Vol. I at 143; Dumont Vol. III at 69-70. Mr. Dumont states he was the owner of a bulldozer and pursuant to a verbal agreement with Mr. Brask, was paid to perform the services described in the Contract. Dumont Vol. I at 143; Dumont Vol. III at 67-68. Mr. Dumont would bulldoze the area of the burning dump, not the Shpack Parcel, and keep the burning dump area at grade. Dumont Vol. III at 69-70. Mr. Dumont performed these duties for six (6) to eight (8) months in order “to make a few bucks” before destroying his machine when Mr. Brask then had other contractors perform the bulldozing services. Dumont Vol. III at 10-11.

The terms of the contract clearly show that Mr. Brask was only to provide labor and equipment to perform bulldozer operations in leveling the burning dump on the Dumont Parcel which was to be performed at the direction of the site manager and the City. Mr. Brask was not an “operator” of the Site. G&B did not exercise control over the day-to-day operational aspects or participate in the financial management of the facility to a degree indicating a capacity to influence the policy for treatment of hazardous wastes. United States of America v. Fleet Factors Corp., 901 F.2d 1550 (1990). Furthermore, as a contractor to the City, Mr. Brask has the protections of sovereign immunity, to the extent applicable, as well as indemnity from the City in connection with any claim based on this one year contract.

Defenses/Exceptions/Exemptions

Based upon the information we have received and for the reasons stated herein, and in addition to the foregoing, Mr. David J. Brask d/b/a Goditt & Boyer is not responsible for any release of hazardous substances at the Dumont Parcel and asserts the following defenses individually and in combination:

(1) the Dumont Parcel was a municipally run public dump and the City of Attleboro (and its contractor, David Brask) are not responsible for costs resulting from actions taken in response to an emergency. 42 U.S.C. §9607 (d)(2) ;

(2) during the period of 1963 through 1965, the release of some or all of the hazardous substances, if any, for which claim is made against David Brask in connection with this matter were federally permitted. 42 U.S.C. §9607(j);

(3) during the period of 1963 through 1965, the release of any hazardous substances was related to an act of war as related to the materials provided or manufactured by area businesses for military use. 42 U.S.C. §9607(b)(2);

(4) any release was the result of an act of God. 42 U.S.C. §9607(b)(1);

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(5) any release to the Dumont Parcel was a result of an act or omission of a third party, such as the owner or operator of the Site, Mr. Dumont and the City of Attleboro, and not from any acts or omissions of Mr. Brask, as Mr. Brask discharged his responsibilities in full through disposal to a governmentally operated facility. 42 U.S.C. 9607(b)(3); and,

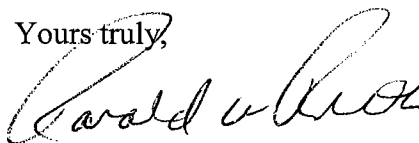
(6) during the period from 1963 through 1965 there is little to no evidence that the materials hauled by G&B contained hazardous substances and if any of the hauled trash contained hazardous substances, the total amount of the material containing hazardous substances was less than 200 pounds of solid materials and occurred before April 1, 2001, whereby any resulting contamination of G&B is *de micromis*. 42 U.S.C. §9607(o).

Conclusion

For all of the reasons indicated herein, the EPA does not have sufficient evidence to assert Mr. Brask is a potentially responsible party for the costs of remediation for the site.

We request that the EPA provide us with any additional information in its possession related to the Site, G&B and/or Mr. Brask. We request the EPA reconsider in light of the information set forth herein its decision to designate Mr. Brask as a Potentially Responsible Party, and/or designate him as PRP for a "zero share" in any further proceedings. We further request EPA keep us informed of its assessment of responsible parties for the remediation of this Site. In addition, we reserve our rights to confirm and add to the information and assertions, defenses, exemptions and exceptions contained herein. Mr. Brask reserves his rights to pursue all of his available remedies under law against any unsubstantiated assignment of costs by EPA or others in the assessment or remediation of this Site.

Yours truly,



Ronald W. Ruth

BAB/ash

cc: Audrey Zucker, EPA Office of Environmental Stewardship
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